TAN KUAN YAU

v.

SUHINDRIMANI ANGASAMY

FEDERAL COURT, IPOH
ABDUL HAMID OMAR CJ (MALAYA)
HASHIM YEOP SANI FJ
EUSOFFE ABDOOLCADER FJ
[CIVIL APPEAL NO. 20 OF 1984]
11 FEBRUARY 1985

TORT: *Negligence - Road accident - Special damages - Amendment during trial - Assessment - Pre-trial loss of income - Post-trial loss of income - Proof of loss - Interference by appellate Court.*

The respondent (the plaintiff in the Court below) was injured as a result of being involved in a road accident on 24 October 1979. He was 23 years old at the time of the accident and he was a goldsmith. He brought an action against the appellant (the defendant) for damages. During the course of the trial, he gave evidence that he estimated that his income was about RM1,200 per month. At that stage, Counsel for the respondent applied to amend the prayer in the Statement of Claim in respect of special damages for loss of income to read at RM1,200 instead of RM600. The learned Judge allowed the amendments and assessed loss of income as follows:

(i) RM30,000 (RM1,000 per month) for 30 months that the respondent was incapable of doing any work;

(ii) RM4,900 for the 7 months when the respondent had resumed work but earned a reduced income; and

(iii) RM42,270 for loss of future income (25 years at RM250 per month).

The appellant appealed against the above assessment.

Held:

[1] Although an appellate Court is always slow to interfere with the trial Judge's findings, it is the duty of the appellate Court to interfere if it is satisfied that there has been a wholly erroneous estimate of damage.

[2] In determining whether the appellate Court should interfere, much depends on the circumstances of each case.

[3] It is clear law that special damages must not only be pleaded but proved. On the evidence before the trial Judge, there were clear contradictions, apart from the fact that the Statement of Claim itself was amended as regards the loss of income.

[4] From the judgment it was clear that the trial Judge only considered evidence given by the respondent under examination-in-chief. The trial Judge failed to consider evidence given under cross-examination. This failure constituted such a misdirection in law and in fact that it justified interference by the appellate Court. The damages awarded were therefore reduced to:

(i) RM 15,000 (RM5,000 x 3) for the 30 months when the respondent did not work;

(ii) RM 1,400 (RM200 x 7) for the 7 months when the respondent earned reduce income; and

(iii) RM 16,900 for loss of future earning capacity.

[Appeal allowed with costs. Order of learned Judge accordingly varied.]

Cases referred to:
Topaiwah v. Salleh [1968] 1 MLJ 284
Greenfield v. London and North Eastern Railway Company [1945] KB 89
Wilson v. Pillay [1957] 3 All ER 525
Elliot v. Preston [1971] 2 Lloyds Rep 328
Ilkiw v. Samuels [1963] 2 All ER 879

For the appellant - Gurdip Singh; M/s Gurdip & Co.
For the respondent - J.S. Sandu; M/s Sandu & Co.

JUDGMENT

Abdul Hamid Omar CJ (Malaya):

This was an appeal against the decision of Anuar J in the High Court at Ipoh on 22 November 1983 in respect of the award for special damages arising from a road accident on 24 October 1979 in which the respondent sustained injuries.

The respondent aged 23 years at the time of the accident, 27 years at the date of the trial, was a goldsmith. He gave evidence that he started to work at the age of 14 with his goldsmith father who, at all material times, was the registered proprietor of the business at a shop along Main Road, Tapah. As his father was old he did most of the work and income went to him. His father continued to assist him. His monthly income prior to the accident was RM1,500 per month and out of this he paid the family expenses. He estimated that the value of his services to the business was about RM1,200 per month.

At this stage of the proceedings, Counsel for the respondent applied to amend the prayer in the Statement of Claim in respect of special damages for loss of income to read at RM1,200 instead of RM600. The learned Judge allowed the application for the amendment although Counsel for the appellant objected to it.

The appellant was dissatisfied with the award on grounds that the learned Judge had erred in law and in fact in assessing the loss of income at RM1,000 per month and on that basis awarded RM30,000 for 30 months during which period the respondent was incapable of doing any work; RM4,900 for 7 months during which time the respondent had resumed work but only earned a reduced income of RM300 per month and RM42,270 for loss in earning capacity for a period of 25 years at RM250 per month.

Now, in an appeal on quantum of damages, it is essential in order to come to a conclusion to bear in mind certain principles which are well established. The appeal Court is slow, indeed, disinclined to interfere with the Judge's finding merely because the appeal Court thinks that if the case had been before it in the first instance a lesser sum would have been awarded. Azmi CJ (Malaya) (as he then was) giving the Judgment of the Federal Court in *Topaiwah v. Salleh* [1968] 1 MLJ 284 said that:

> In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. (See *Flint v. Lovell* [1935] 1 KB 354).

In *Greenfield v. London and North Eastern Railway Company* [1945] KB 89, MacKinnon LJ had this to say:

> The principle on which the Court of Appeal reviews the assessment of damages, whether too high or too low, is not because the Court of Appeal might have given rather more or rather less, but only (1) if the Judge has omitted some relevant consideration or admitted some irrelevant consideration, or (2) if the amount is so excessive, or insufficient, as to be plainly unreasonable.

Lord Evershed MR in *Wilson v. Pillay* [1957] 3 All ER 525 @ 526 emphasised that:

> ... interference by this Court with an award of damages by the trial Judge must be a rare thing, and may I say that it should be perhaps even rarer in relatively small cases tried in the County Court. No one would suggest that, because this Court thought that the damages, small in any case, were rather on the low side, this Court could consider for a moment slightly raising the figure or adopting the converse course in a different kind of case. In other words, the onus on an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a heavy one.

We would also refer to *Elliot v. Preston* [1971] 2 Lloyds Rep 328 where Salmon LJ had this to say:

> Before we can interfere, there has to be (in the phrase which is hallowed, but has now I think a rather archaic ring) a wholly erroneous estimate of damage. That I have always regarded as meaning that a Court has to be satisfied that it is very wrong. If you are satisfied that it is wrong, and seriously worng, then not only is this Court entitled to interfere, but it is its duty to interfere. I would agree ... that you cannot say, if it is wrong by such and such a per cent, you do interfere, and if it is not you do not. I think each case stands by itself, and a great deal depends upon the amount of the award.

The principle that should guide this Court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case in particular the amount of the award. In a particular case therefore it is for the appeal Court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the Judge to consider some relevant materials, or he had admitted for purpose of assessment some irrelevant considerations. If the Court is satisfied or convinced that the Judge has acted upon wrong principle of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial Judge.

Turning now to the present case we are firmly of the view that the learned Judge acted erroneously when he misdirected himself in law and in fact in his assessment of the damages.

It is to be observed that the law in regard to claim for special damages is clear law in that it must not only be pleaded but proved. Diplock LJ (as he then was) in *Ilkiw v. Samuels* [1963] 2 All ER 879 clearly expressed the view that:

> ... it is plain law - so plain that there appears to be no direct authority, because everyone has accepted it as being the law over the last hundred years - that one can recover in an action only special damage which has been pleaded, and, of course, proved.

The question therefore is whether the learned Judge acted upon established principle when he fixed the loss of income at RM1,000 per month. On the evidence before the learned Judge, it seemed clear that apart from the fact that the Statement of Claim, before the amendment, had alleged that there was a loss of income of RM600, the respondent himself in no uncertain terms admitted under cross-examination that the profit was only RM600 per month. The relevant part of his evidence reads:

> Before the accident, I was not paid salary. From the profit, my father used to hand over to me. In a month the gross income is about RM1,500. The profit is about RM600.

In our view this piece of evidence was highly relevant. It was a clear admission made by the respondent. Viewed in the light that the respondent was the only witness upon whose testimony the respondent sought to prove the loss, we were inclined to think that it was a clear misdirection on the part of the learned Judge when he omitted to consider it. A person judicially trained confronted with the evidence as were found in the circumstances of this case would not be unlikely to have come to a decision, on the balance of probabilities, that the loss suffered would only have been in the region of RM600 per month. The omission to consider the relevant evidence was apparent from the grounds of judgment which clearly disclosed that the learned Judge only took into consideration the evidence given by the respondent under examination-in-chief as follows:

> The plaintiff carried out work as jeweller which is the main source of income. He also sells a few jewellery in the shop. He claims that his earning is RM1,500 a month. After taking expenses for the family his income is RM1,200 per month.

This was followed lower down in the Judgment in a concluding sentence which reads:

> As for loss of earning I am of the view that the plaintiff was earning about RM1,000 per month at the time of the accident.

We reiterate that to arrive at such a finding in the light of the clear admission by the respondent constituted in our judgment a serious misdirection in law and in fact such that it justified interference by this Court. It is primarily for this reason that we considered it fit to interfere.

Proceeding upon the basis that there was a profit of RM600 per month, a deduction must be made for the share of the father who, according to the respondent, was old but still assisted him. A reduction of a sum of RM100 should therefore be made. Thus for the 30 months during which period the respondent was not able to work he ought only to have been awarded a total sum of RM15,000 (RM5,000 x 3).

For the next 7 months when the respondent resumed work and but was only getting a reduced income of RM300 per month, he should have been awarded only a sum of RM1,400 (RM200 x 7).

And lastly, for loss of earning capacity we are of the view that a loss of income of RM100 per month would have been a fair assessment. And granted that there was a loss in the earning capacity for a period of 25 years, the total amount, calculated on the accepted table, that should have been awarded would have come to RM16,900.

For these reasons we allowed the appeal with costs. The order of the learned Judge was accordingly varied.

Also found at [1985] 1 CLJ 429